No. 6124

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Peter Connley and Herman F. Quirin,
Appellants,

vs.

United States of America,
Appellee.

REPLY BRIEF OF APPELLEE.

SAMUEL W. MCNABB,
United States Attorney.

J. GEO. OHANNESIAN,
and
WILLIAM R. GALLAGHER,
Assistant United States Attorneys.

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TABLE OF CASES AND AUTHORITIES CITED.

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REPLY BRIEF OF APPELLEE.

This is an appeal from a judgment of conviction in the District Court of the United States for the Southern District of California by appellants Peter Connley and Herman F. Quirin, who, together with Nick Bruno, and Joe Verda (the latter two, Nick Bruno and Joe Verda, were acquitted by the jury) were tried jointly in an indictment charging in six counts as follows:

1. A violation of section 37 of the Federal Penal Code; that is, a conspiracy to transport, manufacture and possess large quantities of intoxicating liquor in violation of the National Prohibition Act.

2. Unlawful manufacture for beverage purposes of about 1300 gallons of intoxicating liquor in violation of

section 3, Title II of the National Prohibition Act of October 28th, 1919, as amended March 2nd, 1929.

3. The unlawful possession of a still and distilling apparatus, with the knowledge that said still and distilling apparatus had not been registered by said defendants as required by law.

4. The unlawful engagement in and carrying on of the business of distillers without having given bond as required by law, with intent to defraud the United States of America of the tax on spirits distilled by them, in violation of section 3281, United States Revised Statutes.

5. The unlawful making and fermenting of mash fit for distillation and for the production of spirits and which said mash was not then and there intended to be used in the manufacture of vinegar exclusively or at all, in violation of section 3282, United States Revised Statutes.

6. The unlawful possession of about 1300 gallons of intoxicating liquor for beverage purposes, in violation of section 3, Title II of the National Prohibition Act of October 28th, 1919. [Tr. pp. 2-11.]

The appellant Peter Connley was convicted on all counts. Appellant Herman Quirin was convicted on the first count, charging conspiracy and acquitted on the remaining counts of the indictment.

A motion for new trial on behalf of each of the appellants was made and denied. Sentence was thereupon imposed upon Peter Connley as follows:

> "To be imprisoned in the United States Penitentiary at McNeil Island, Washington, for a term of one year and two months on the first count;

two years on the second count; one year and two months on the third count; one year and one month on the fourth count and one year and one month on the fifth count. Sentences to run consecutively, making a total sentence of six years and six months and in addition thereto, pay a fine into the United States of America in the sum of $4,000.00, and court costs taxed at $947.22, and with respect to the sixth count, it appearing that this does not involve imprisonment, a maximum fine of $500.00 which the imposition of fine of $4,000.00 covers. It is the further judgment of the court that said defendant stand committed until said fine of $4,000.00 and costs shall have been paid."

The defendant Herman F. Quirin was sentenced to be imprisoned "in the United States Penitentiary at McNeil Island, Washington, for the term and period of twenty-one months on the first count and in addition thereto pay into the United States of America fine in the sum of $1,000.00 and court costs taxed at $947.22 and stand committed until said fine and costs shall have been paid." [Tr. p. 40.]

STATEMENT OF FACTS.

The statement of facts set forth in appellants' opening brief is, in the main, correct. The statement, however, is rather lengthy and embodies numerous references to the testimony adduced at the trial. Ordinarily, it is not customary for the appellee to submit a detailed statement of facts; nevertheless, we deem it advisable in view of the length of appellants' statement to narrate the testimony of two Government investigators, O. G. Spencer and William P. Clements, in order to fully advise this

Honorable Court of the facts. Government witness, O. G. Spencer, was called on the 25th day of March, 1930, and testified as follows:

"The Witness: I have gone out to the Bruno Ranch about five times altogether. The last time was yesterday and I was out there last Saturday. The first time I was there I arrived about 11 o'clock in the morning of January 24, 1930, three days after the raid. I went alone as far as Elsinore, where I picked up Chief of Police Barber, who went with me. I made an investigation of everything that I could find or see from the highway by Mr. Quirin's home, through the Bruno Ranch and around the still and around the house and all the sheds and everything that I could find that had any bearing on the case. I know where the mine pit is located. On the first day I was there I examined the pipeline and the water system from the pumps down in the mine all the way to the Bruno house and to the still. There was no other pipe connection or no other source of water supply to the still itself that I could find other than this pipeline, except there was a portable system. They could have hauled water in a wagon or something; but there was no regular pipeline system. That was the only permanent means of water supply. From the mine the pipeline runs in an almost direct course to Mr. Bruno's ranch and right straight south from the north fence on his ranch to a concrete pit right back of the house. It ran over farming ground across Mr. Bruno's place, and across Quirin's place. Grain had been planted on the land through which this pipeline passed but it had not sprouted yet. Yesterday was the last time I went out there and observed that there was grain growing. There were either four or five places that

the pipe cropped out of the ground from the mine to the concrete pit. Three of those were inside of the fence in the field of grain—cropped out in three places in the field. The pipeline ran from about 8 inches below the ground to the surface of the ground, and in some places it stuck above the surface just a little bit. There was a pipeline running from the fuel tank buried in the ground directly in front of the shed near the Bruno house direct to the still pit and the pit of the boiler. It ran through the planted field. The pipe showed up for 15 or 20 feet between the tank and the still up near the fuel tank. After it left the gasoline tank or reservoir it went to the burner under the boiler in the still pit. I followed the pipe all the way except right for a little distance. On the roof of the still pit it was covered up in the dirt before it came through the wood. I saw where it was connected at the far end to the fuel tank. The buried tank was a little over half full of fuel.

In the shed that was on the hill near the Bruno house I examined the oil drums and found 60 altogether. All of them had marked on one end, 'No. 2, Dist.' I don't know what that 'Dist.' stands for. That was stencilled on the end. There was one similar drum, painted the same color, with the same marking on the end, at the Quirin home near the road when I arrived there; and it was there for one or two weeks after my first trip there. The Quirin home was right adjoining the Elsinore-Perris highway near the mine. I went down into the still pit and made an investigation there, finding some large wooden fermenting vats and some galvanized tanks. Six of these vats were practically full to six inches of the top with mash, most of it fermenting. I figured the capacity of those vats to be between 8,000 and 9,000 gallons each. This mash was fer-

menting and boiling pretty lively. I poisoned it to stop that. At that time I noticed there were galvanized iron tanks in the pit. Two of them were connected up and the other was disconnected. The two that were connected up were practically empty; but there was very little liquor in the bottom, dripping out of the spigot, when I opened it. I went out there yesterday primarily to take Mr. Kruse to see if he could identify that boiler base; and I made a very casual investigation as to the lumber or timber that was used in the Quirin house, as I had examined that very thoroughly before. I made an investigation of the lumber that was used in the mine pit and. likewise, the timber or lumber that was used in the still pit. I was in court when the Government offered in evidence tags as to items of lumber sold to Quirin.

In the still pit there were 4x4s, 2x4s and 2x12s. There were two or three 8x8s and several 6x6s. I did not find any like dimensions in the house known as the Quirin house. I did find in the mine pit some 2x2s and some 2x4s. I did not find any 4x4s in the mine pit. They were in the still pit next to the boiler on the east side of the pit. When I took Mr. Kruse there yesterday I examined the boiler base right at the still. The boiler base was lying within about 20 feet of a pile of hay over the still. That was the dismantled boiler outside."

The testimony of Government witness W. P. Clements was as follows:

"I am a federal prohibition agent. Have held that position for two years, being in that position in January and February of this year. I have seen the defendant Verda before; also the defendant Bruno. First saw one of them on a ranch about five miles east of Elsinore, known as the Bruno Ranch in that

district, that being the premises testified to by Officer Spencer. The first time I was in Elsinore was along about the 15th of January of this year, and I was in the company of three other agents then. Their names were Agents Short, Schermerhorn and Alles. On this first occasion I did not see any of the defendants. The next time I went there was January 21st. Agent Alles was with me. It was between 1 and 2 p. m. in the afternoon when I arrived at the Bruno Ranch. I first saw the defendant Joe Verda. He came out of the house on the ranch marked 'E' on the map and walked down to the road with a red handkerchief in his hand. We were driving in an automobile and he came out of the door on the side of the house. We were probably two or three hundred feet away between this gate and the house. He walked on down the road we were coming in and he walked almost directly in front of the car and waved the handkerchief like this (indicating) to stop the car; and we didn't stop. We pulled on around him and drove clear around the side of the house and in back of the house marked 'E'. The defendant turned around and came back up to the house. I did not see the defendant Bruno at that time. At that time Verda didn't say anything. He came up to the house and the defendant Pete Connley, or George Walker—he gave his name as George Walker, the heavy set gentleman there at the corner of the table by Mr. Doherty, the assistant United States attorney—came out of the other door of the house. There are two doors, one on the south side and one on the north side of the house. The house is set east and west. He came out of the other door where we had driven almost directly behind the house. When we stopped he came out and he, Walker, otherwise Pete Connley, spoke to me and I told Mr.

Walker who I was. He said, 'Good afternoon,' I believe it was. We passed the time of day. I don't remember the words he used. And I immediately told him who I was. I told him I was a federal prohibition agent and had information that there was a still on this ranch and that I would like to look around. At this time Agent Alles and the defendant Verda were standing close to the house, probably 5 or 6 feet away. Mr. Connley said he didn't know of any still around there and that we were perfectly welcome to look around, and to come on in the house. I told Connley there was nothing in the house I wanted to see; that, if the still I had heard was around there, it wouldn't be in the house. He said, 'Come on in anyway.' And we went in the house, walked through the house, and in a small room we found a boiler for a still, I should judge a 150-gallon copper boiler. It was not in use. This was a boiler around 5 feet high and about 30 inches across, I should judge, with a connection in the top. There was nothing connected to the top. There were no coils. There was a connection for the fitting. It wouldn't be a pipe fitting but it was a joint. It had a cover like this and a round hole in the top of it; and, if I remember right, there was a connection for a bolt joint fitting. I had seen something like it before, having been in the prohibition two years. I have seized between 40 and 50 illicit stills and I would say it was a boiler for a still. It had been used but not recently, the fact that it was smoked on the bottom indicating that it was used. There was no mash or anything on the inside. It had been washed out clean. Agent Alles, the defendant Peter Connley and myself turned around and came out of the house and walked over to a shed possibly 50 feet from the house. Verda stayed close to the

house. He didn't stay in the house. He came out and stayed around close to the outside of the house. We walked out to this distillate shed (marked 'H'); and it was practically full of 50-gallon distillate barrels. I walked over to one of these and shook it and it was full of distillate. It was a 50-gallon iron barrel, the regular iron barrels they use for oil. At the same time I saw this buried tank in front of the shed (marked 'I'). I saw the top of this tank; and I walked back over to the defendant Connley and said, 'Well, where is it at'? He said, 'I don't know that there is anything around here.' So Agent Alles and the defendant Connley and Verda, he having come out where we were about that time, and there being a very well defined road down this hill between the shed and the house, the road that ran down to the still—I said, 'Let's walk down this road and see what there is here.' So Agent Alles, the defendant Connley and the defendant Verda and I started down the road. Verda stopped about half way down to the still and Connley and Agent Alles and myself proceeded on down to the still location. We got to the top of the hole. And I asked the defendant Connley what was down in this hole. He didn't answer but he started on down the ladder of the hole; and he stopped at the top after he had taken a couple of steps on the ladder, his head being still above the hole, and said, 'There is no use of you fellows coming down in here. We can fix this up all right. I know the owner of the still and we can all make some money on it.' So I told the defendant Connley we would go on down; that money wasn't what I was there for. And we went down to the still. And there was about seven or eight thousand gallons of mash. It was about 8x12, 8 foot high and 12 foot across, approximately a thousand-gallon still, and

some alcohol. I didn't know how much at that time. It later turned out there was one hundred and fifty 5-gallon cans. There were 25 5-gallon cans sitting on the floor, 625 gallons and a cooling tank. After we came back up out of there I immediately arrested the defendant Walker, or Connley. He gave the name of Walker. George Walker was the name I knew him by. Agent Alles and the defendant Walker and I came back up to where Verda was standing; and we arrested him, too, at that time and walked on back up to the house. When we went down to the still, that is, Agent Alles, Walker, Verda and I, there was a truck sitting back of the Bruno Ranch house marked 'E'. As we started down there there were two or three gentlemen in the field down below the house at the time working on something, either a pipeline or on some lumber that was there. One of these gentlemen came up and got on this truck when we were about half-way down to the still. He started the truck up and drove it off. As soon as Alles, Walker, Verda and I came back to the house I asked Walker what his connections were there and he said he was building a water tank. There was some lumber there which he was working on. He said that he was a contractor. I asked Verda what his connections were there and he said he was hired to take care of the ranch, the mules and the house; was getting $30 a month for doing it; that a man by the name of Frank Ramiro hired him; that he had been there about four days. The defendant Connley stated that he had been there about ten days. The defendant Connley didn't ask me how much money I was making a month at that time. He asked me if there wasn't some way that he could fix this up; that there wasn't any use of anybody going to jail over a place like this; that there

was too much money invested; that it would be easy for all of us to make money. I did not observe the defendant Verda do anything while I was there except when we came up there he tried to stop us by waving his handkerchief at us and getting out in the road in front of us. That is the only thing he did while I was there. I left as soon as I had this conversation with the defendant Connley and the defendant Verda and followed this truck. I had the license number of the truck, having taken it when I went up there. I followed it over to the house on the highway that was occupied by the defendant Herman Quirin, the house marked 'B'. This truck drove up in the rear of that house and stopped, being stopped when I was there. I didn't see it come in but I followed it over there; and it was setting there when I got there. I stopped and went over to the truck. There was nobody around the place and I walked on in the house and there was nobody in the house. The house was furnished. At that time I didn't know whether this house was on the same ranch with the still or whether it was two different ranches. And I came out and went to Elsinore and called the prohibition department for help and at the same time met Chief of Police Barber. I had taken the rotary off this truck, off of the distributor of this truck, so that they couldn't move it. I was probably gone forty minutes. Chief of Police Barber and I came back from Elsinore to this house. And the truck was gone and the defendant Herman Quirin was there shaving when we walked into the house, into Quirin's own home, the house on the highway marked 'B'. There was nobody there but him. When I walked in he said, 'What do you mean by coming in here'? I said, 'I have come over after you.' The defendant Quirin said, 'What are

you going to do? Take me over and set me on the spot'? So I told him I wasn't setting anybody on the spot; that, if he was guilty, I wanted him, and if he wasn't guilty I didn't want him. So I asked him what became of the truck. He said, 'Well, the man that owned the truck took the truck away.' I said, 'Do you know the man that owned the truck'? He said, 'I saw him a few times.' I said, 'Well, who was he'? He said, 'Well, I don't know him by name but I know him when I see him.' We waited until Mr. Quirin got through shaving, he being about a half or a third through, having just got his face lathered and had taken just about one scrape with the razor. We took him over to the still with us. All of the defendants made the statement that this ranch was the Bruno Ranch and that Nick Bruno owned it. I told Chief of Police Barber, if he knew where Nick Bruno was, to take my car and go get him. He didn't have any car. It was a government car we were using. So he took that car and proceeded back to Elsinore and in an hour or a little more the constable came. I do not know his name. He came back with Nick Bruno and some goats on a truck. So Agent Alles went with Bruno to take the goats wherever he, Bruno, was going; and then Bruno and Agent Alles came back. After we came back from Elsinore we stopped at Quirin's home, marked 'B', and picked him up and came over to the Bruno Ranch, Bruno being the last man to come there, he coming there when he was brought there by the constable. At the time I went into the house marked 'E', the Bruno house, I was invited in the house by the defendant Connley. And at that time I did not see an electric bell on the wall, but the first time I was in the still I saw a bell in the still on a post. I had never found the push button yet the

first time I was in the house. Later that afternoon this bell and other apparatus was traced out by Chief of Police Barber and Mr. Piles of a newspaper out there; and they traced it back to the house and showed it to me. It was in the room next to the dining room. The bell was on the side of a 2x4 if I remember, on a joist that ran up; and they had nailed a board over this to cover up the button and you had to reach around this board to get around to push the button. I did not operate it to see whether it worked or not. I don't remember any of the defendants making any statements to me.

They were taken in two carloads to the Elsinore jail, there being Assistant Administrator Peters and Investigator Noe and Agent Alles and Investigator Rhodes, Chief of Police Barber and the constable. We left them at the Elsinore jail; and I did not at any time after that date have any conversation with the defendants."

Specification of Error Urged and Argued by Appellants Peter Connley and Herman F. Quirin.

1. That the third count of the indictment does not state facts sufficient to constitute any offense against the United States.

2. That the offenses charged and attempted to be charged in the second, third, fifth and sixth counts of the indictment are component parts of, and necessarily included in, the offense charged in the fourth count of the indictment, and sentences on each of said second, third, fourth and sixth counts, to run consecutively constitute double jeopardy and result in five different punishments for the one inclusive offense.

3. That the court was guilty of misconduct prejudicial to the rights of appellants in its examination of the witness Kelly.

4. That the court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelley out of the presence of the jury, after the court had examined him out of the presence of the jury.

5. That the court erred in limiting the cross-examination of the plaintiff's witness, Albert Kruse.

6. That the court erred in admitting in evidence the written statement of the witness Amsbaw, and in commenting on the contents thereof and was guilty of misconduct in its examination of this witness.

7. That the court erred in denying the motion of the appellant Quirin for a directed verdict of not guilty, made at the conclusion of the Government's testimony and renewed after the defendants had rested.

8. That the United States attorney was guilty of misconduct in his argument to the jury, which misconduct was prejudicial to the rights of appellants.

9. That the court misdirected the jury.

ARGUMENT.

I.

The Third Count States Facts Sufficient to Constitute an Offense Against the United States.

The first point urged and argued by appellants Connley and Quirin is that the third count of the indictment does not state facts sufficient to constitute an offense against the United States. The third count of the indictment charges as follows:

"That the defendants * * * did knowingly, wilfully, unlawfully and feloniously, have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit * * * which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been registered with the said Collector of Internal Revenue as required by law." [Tr. p. 7.]

and as correctly stated by counsel for appellants, this charge is laid under Revised Statutes, section 3258, 26 U. S. C. A. 281, which provides:

"Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner of Internal Revenue. Stills and distilling apparatus shall be registered immediately upon their being set up. Every still or dis-

> tilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500 and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. (R. S. 3258.)"

That in view of the change in the law as to the person with whom stills should be registered, that a charge as set forth in the indictment does not state an offense against the United States; that after the passage of the Reorganization Act, it was no longer required that one in the possession or custody or control of a still which had been set up, register it with the Collector of Internal Revenue and failure so to register such still is no offense and that an indictment charging such a failure and not charging the failure to register such still with the Prohibition Administrator as required under Article 18 of Regulation 3, promulgated by the Secretary of the Treasury on October 1st, 1927, we would concede the point made by counsel were it not for the fact that there is no fundamental difference in the law which now requires that a still must be registered with the Secretary of the Treasury and the officers whom he shall designate. In our opinion the essence of the offense being the unlawful and felonious possession of unregistered distilling apparatus which the evidence showed beyond a shadow of

doubt was in the possession of the defendants nor was there any evidence that any attempt was ever made to register same as required by law on the part of the defendants but on the contrary, the evidence tended to show that the appellants surreptitiously possessed and maintained the still in question. This objection to the indictment is raised for the first time in the appeal of appellants from the verdict and judgment of the court and as stated in the case of *United States v. Diebella* (28 Fed. (2nd) 805), an objection that the indictment charged the crime of possessing registered still in the language of Revised Statute No. 3258, requiring those in possession and custody and control of a still to register them with the collector of the district instead of as provided by Regulation 3, Article XVIII, promulgated by the Prohibition Commissioner on October 1st, 1927, requiring proprietors, distillers and others to register stills with the Prohibition Administrator when not raised at the time of trial cannot be raised for the first time on appeal.

II.

The Sentence Imposed on Counts Two, Three, Four, Five and Six Do Not Constitute Five Punishments for One Offense.

Counsel next contend, in point two of their argument, that the offenses charged in counts two, three, five and six are component parts of and included in the offense charged in the fourth count of the indictment, and that the sentences imposed on all of such counts constitute five punishments for one offense. It should be noted at the outset that no demurrer was interposed to the indict-

ment on that ground, nor was any motion made for election directed to those five counts. No exception was taken to the admission of evidence or to the instructions of the court on these charges. It is, therefore, unnecessary for this Honorable Court to now pause to inquire whether these several offenses charged are in fact but one. This Honorable Court, speaking through Judge Gilbert, has announced the rule in *Kuehn v. United States,* 8 Fed. (2d) 265, as follows:

> "On an information which contained five counts, the plaintiff in error was convicted under the first two, the one charging him with the unlawful possession of a pint of moonshine whiskey on July 2, 1924, and the other charging him with the unlawful sale of a pint of moonshine whiskey on that date. He contends that the two offenses so charged are, in fact, but one, and he assigns error on the ground that he is twice punished for a single offense. We need not pause to inquire whether the two offenses are in fact but one. No demurrer was interposed to the information on that ground, nor was any motion made for election, and no exception was taken to the admission of evidence or to the instructions of the court on these charges. Bilboa v. United States (C. C. A.), 287 F. 125."

It is true that a motion was made requiring the Government to elect whether it would proceed on the second or fifth count, which said motion was properly denied, for the reason that the second count charged the appellants with manufacture of intoxicating liquor under the National Prohibition Act as amended, and the fifth count charged the appellants with feloniously making and fermenting about fifty thousand gallons of mash on certain premises other than a distillery. No motion to elect, however, was directed to count four, which count the

appellants now claim embraces the offenses charged in counts two, three, five and six. This we deem a sufficient answer to appellants' second point.

There is, however, a further answer to appellants' second contention. Assuming, but not conceding, that the offenses charged in the second, third, fifth and sixth counts are embraced in the fourth count, the total sentence of imprisonment imposed by the court on all counts amounted to six years and six months. [Tr. p. 39.] This constituted but one sentence. *Koth v. United States,* 16 Fed. (2d) 59. The court might have imposed a total sentence of seven years on the first and second counts charging conspiracy and manufacture. Then, assuming that counts two, three, four, five and six are all merged, the total sentence imposed of six years and six months is still within the limit that might lawfully have been imposed by the court on counts one and two. As was said in *Koth v. United States, supra:*

> "Where conviction is had upon more than one count, the sentence, if it does not exceed that which might be imposed on one count, is good if that count is sufficient. Wetzel v. United States, 233 F. 984, 147 C. C. A. 658."

This argument applies with equal force to point one, urged by appellants.

We do not consider, however, that the offenses charged in the second, third, fourth and fifth counts are but one offense, and counsel has nowhere in his brief cited authority directly to that effect, and attempts to reason from analogous cases. We submit there is no merit in appellants' second contention.

III.

No Misconduct Was Committed by the Court in Its Examination of the Witness Kelly.

Appellants in the third assignment of error claim the court was guilty of misconduct prejudicial to the rights of appellants in its examination of the witness Kelly. As stated by counsel for appellants, Richard Kelly was called March 19th, 1930, as a witness for the Government and recalled by the Government on March 25th, 1930. This witness was called for two purposes; first, to prove that appellant Connley was the man who purchased the 30 H. P. boiler which was at a later date found at the still; secondly, to identify him as being one of the parties who called for and took away the boiler in question. All of the cases cited by counsel in support of their third assignment of error are upon the right of cross-examination of one's own witness without laying the foundation required for cross-examination of one's own witness. We respectfully submit that this witness was recalled at the instance of the court and not by counsel for the Government and after the examination of Government witness Albert Kruse, an employe of Kelly. The court, of its own motion, being of the opinion that the witness Kelly made every effort to evade answering the interrogatories put to him by counsel for the Government as well as those of the court, took upon himself the questioning of the witness Kelly in order that the true facts in the case might be placed before the jury and it hardly behooves counsel for the defendants to even intimate that the court used methods other than were honorable and proper in the premises.

It will be conceded that it is the judge's duty to see that justice is done and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued, it is his duty to interpose, either by suggesting to counsel or by an examination conducted by himself, avoid the miscarriage of justice, especially where the witness is reluctant or evasive and it seems to us the height of folly for appellants, if not impudent on their part, to question the integrity and motive which prompted His Honor, Judge Killits, learned in the law and honorably retired after twenty-five years of active service as Federal District Judge, and it ill becomes our young but energetic friends, espousing the cause of appellants to assume that His Honor pursued the course that he did for any other purpose than to prevent a miscarriage of justice. Counsel in support of their contention that the court was guilty of misconduct prejudicial to the rights of the appellants, in its examination of the witness Kelly, cites at length the case of *Allen v. United States,* 182 Fed. 464, but in considering his case, it is well to bear in mind that the act complained of in the case cited, took place in the presence of the jury, while in the case at bar, *none of the acts complained of took place before the jury.* It thus appears that if there were any irregularities either in the conduct of His Honor or that of the Government attorney during the absence of the jury, it could in no manner have affected the jury in its final consideration of the case, and therefore cannot be successfully contended that it was prejudicial to the rights of appellants. The court in the case cited stated that while a trial judge in the exercise of his discretion to expedite the trial may participate in the examination

of witnesses, he should do so in such a manner to impress the jury with the idea that he was entirely impartial and so as to avoid the appearance of being an advocate of either side. This, in our opinion, was the attitude of the learned judge who presided over the case at bar. It apparently was not the case in the case cited by counsel, for the learned court went on to say:

> "The Circuit Court of Appeals is reluctant to interfere with the exercise of the discretion of the trial judge in participating in the examination of witnesses but will do so when the judge's examination has been conducted in a manner so hostile to the defendant and his witnesses as to appear to produce in the minds of the jury the impression that the judge has a fixed opinion that the defendant is guilty and should be convicted."

Such, however, was not the conduct of the able judge who presided at the case at bar; first, for the reason that the acts complained of were in the absence of the jury and secondly, that the conduct of the judge throughout the entire trial was eminently fair and could not have impressed the jury with any idea save and except that the defendant should have a fair and impartial trial.

In the case of *Callahan, et al. v. United States,* 35 Fed. (2d) 633, objection was made to the language of the court as addressed to counsel appearing for appellants, the court having made the following statement:

> "That is one reason why you should not be entitled to practice in this court. I certainly won't open it up. Sometime, some place you took an oath. When you say you want to file a demurrer that you say yourself is not true, you are violating that oath."

The court in commenting upon this phase of the case stated as follows:

> "It is unnecessary to consider whether this language was justified as no exception was saved to it for review by this court. No prejudice to the defendants was shown as the remarks were made wholly to counsel. A jury had not been called and it doesn't appear that any of the trial jurors even heard the remarks or could have been influenced to any extent. The cases of Allen v. United States, 115 Fed 3, and Grock v. United States, 289 Fed. 544, on which appellants rely, therefore have no application."

We fail to see how any of the cases cited by appellants commencing with the case of *Glover v. United States*, 147 Fed. 426, to and inclusive of case of *Rutherford v. United States*, 250 Fed. 855, nor the case of *People v. Mahoney*, 201 California, 618, can be at all considered as supporting counsel's contention for the reason that in all the cases cited, the alleged errors, if any, were committed in the presence of the jury and were by the court held prejudicial to the rights of the appellants in that the court had so conducted itself as to have impressed the jury with the idea that the judge thereof had a fixed opinion that the accused was guilty and should be convicted. In the case at bar, the court interrogated a reluctant witness and same was conducted without prejudice to defendant; therefore the court acted within its discretion.

Swan v. United States, 295 Fed. 921.

It is respectfully submitted that no error was committed by the court in its examination of the witness Kelly and that the defendants did have a fair and impartial trial.

IV.

The Court Did Not Err in Refusing to Allow Counsel for Defendants, or Any of Them, to Interrogate the Witness Kelly Out of the Presence of the Jury After the Court Had Questioned Such Witness Out of the Presence of the Jury.

In our opinion, the examination of Kelly by the court out of the presence of the jury was not a part of the trial, therefore not subject to the cross-examination on the part of counsel for appellants and even if allowed could in no way assist the jury in its final deliberation. The case of *Calahan,* 35 Fed. (2d) 633, may again be cited in support of our contention that the court had the right to deny the request of appellants to examine the witness Kelly out of the presence of the jury in that the same and the whole thereof would not be relevant nor would it assist the jury in arriving at a just verdict. The court in the case cited made this observation:

> "We fail to find that the questions asked by the court were sufficient to indicate any opinion relative to the guilt or innocence of the accused. The contention that the court unduly limited the examination of witnesses is also without merit. The purpose was obviously to avert unnecessary repetition and confine the inquiry to relevant matter. We think the rulings were well within the proper discretion of the court. In any event, we are convinced the guilt of the defendants was clear and their substantial rights were not adversely affected."

Counsel for appellants do not contend in their fourth assignment of error that the alleged error in refusing to allow counsel for defendants to interrogate the witness

Kelly in any way prejudiced the case nor deprived the defendant of any of its substantial rights nor that if counsel were permitted to interrogate the witness, the result thereof would have in any wise affected the final termination of the case.

V.

The Court Did Not Err in Limiting the Cross-Examination of Plaintiff's Witness Albert Kruse.

That a witness may not be cross-examined on other matter on which he may have testified on direct examination is elementary, notwithstanding counsel's statement to the contrary.

It is true that by the English rule which is followed in several of the states, a witness who is sworn and gives some evidence, however formal or unimportant may be cross-examined in relation to all matters involved in issue, but a stricter rule, sometimes called by way of distinction, the "American rule", obtains in the federal and very many of the state courts. Under this rule the cross-examination of a witness is limited to an inquiry as to the facts and circumstances connected with the matter stated in his direct examination and much is left to the discretion of the trial court.

VI.

The Court Did Not Err in Admitting in Evidence the Written Statement of the Witness Amsbaw and in Commenting on the Contents Thereof, and Was Not Guilty of Misconduct in Its Examination of This Witness.

Appellants herein complain that the court erred, first, in admitted in evidence the written statement of the witness Amsbaw, and secondly, in commenting on the contents thereof, and that as such, it was misconduct on the part of the court in its examination of the witness

relative thereto. The copy of the statement referred to was ordered admitted in evidence over the objection of counsel for appellants [Tr. p. 160], and was by the clerk marked "Special Exhibit introduced by order of Judge". Here again the alleged error, if any, was committed out of the presence of the jury, and upon a subject matter, to-wit: the written statement which only related to the activities of one Nick Bruno, a co-defendant who was acquitted by the jury. It is true that the name of Quirin incidentally appears in the statement, but taking the entire statement as a whole, it merely relates to the defendant Quirin, and the fact that he was acquitted is sufficient proof of the fact that the introduction of the statement and any comments thereon made by the court in the absence of the jury did not affect the jury in its final determination of the case in so far as any of the appellants herein are concerned.

Here again counsel for appellants find fault with the conduct of the presiding judge because of the fact that the court took upon himself in the absence of the jury to question the witness Amsbaw, solely for the purpose of refreshing the defendant's recollection as to what Bruno had said. Counsel seems to object to the fact that the examination was conducted out of the presence of the jury and by the court instead of counsel for the Government.

We respectfully submit that if the court in his opinion was convinced that counsel for Government failed to properly present the facts involved, that the court had full authority in furtherance of justice to take upon himself the task of examining a witness, and as it ap-

peared in this case the court did not, by its examination, intimate the guilt of any one of the defendants, nor was the jury advised of what transpired in its absence. It necessarily follows that the jury was not in any way affected in its final determination, and it ill becomes counsel to even suggest that the court was in any way prejudicial or unfair in its cross-examination of the witness referred to.

VII.

The Court Did Not Err in Denying a Motion of Appellant Quirin for a Directed Verdict of Not Guilty Made at the Conclusion of the Government's Testimony and Renewed After the Defendant Had Rested.

Counsel for appellants predicate this alleged assignment of error upon the ground of the "insufficiency of the evidence". Motion was duly made before and after the case was concluded by the Government, was denied and exception taken thereto. [Tr. p. 31.] We respectfully call the court's attention to the wording of the ground of objection, to-wit: "insufficiency of the evidence", which of itself presupposes that there was evidence submitted to the jury, but that counsel's objection goes as to the sufficiency thereof, a matter in our opinion to be passed upon by the jury who are the judges of the facts as covered by the law in the case.

It is well to bear in mind at this point that there is a distinction to be drawn between insufficiency of the evidence to support a verdict of guilty, and the legal insufficiency of the evidence to support a verdict of guilty. The objection does not go to the legal insufficiency, but

merely to the sufficiency of the evidence to sustain a verdict, but as stated above, the jury is the sole judge of the facts, and this is as it should be, for the reason that the trial jury had before it all of the witnesses could observe their demeanor, the reasonableness of the story, the opportunity of the witnesses of knowing the things about which they testified, the interest or lack of interest in the results of the trial, and all other disclosed circumstances bearing upon the credibility of the witnesses, and they alone could determine where the guilt in the case lay, and if there is any evidence upon which rational minds might arrive at a right conclusion, we respectfully submit that this court can not reverse, and should not reverse, the findings.

Counsel in support of their contention that the court should have granted their motion for a directed verdict, cite the case of *Sugarman v. United States*, 35 Fed. (2nd) 663, wherein several defendants, including Sugarman, were charged with conspiracy to violate the National Prohibition Act by possessing and transporting intoxicating liquors in certain counties in Southern California.

The motion in the above case for a directed verdict was as to the defendant Williams, wherein the facts were as follows:

The testimony tending to connect the appellant Williams with the commission of the offense is inconclusive and unsatisfactory. He was referred to on different occasions as one of the parties employed by the conspirators in the transportation of liquor from boats offshore to land, but this testimony was not sufficient to connect him with the conspiracy, and was not competent for that purpose. It

further appeared that he operated a boat which was later destroyed by fire, and it is claimed that this boat was employed for the purpose of transporting liquor to the shore, but this likewise appears only from statements of one or other of the conspirators. The boat to which we have referred was searched on two different occasions by the officers of the coast guard, while operated by Williams, but no intoxicating liquor was found. At the time of his arrest Williams was in company with one Rasmussen, an alleged conspirator who died before the trial. Rasmussen had on his person at the time of his arrest a receipt given for a part payment on the purchase price of the boat which brought the liquor into the United States, as charged in the third count of the indictment, and no explanation of such possession was offered. At the time of his arrest, Williams gave a fictitious name, and removed the coat he was wearing, replacing it with another. The coat thus removed was offered in evidence, and corresponds in texture with a pair of pants found in the boat which had been abandoned while attempting to introduce intoxicating liquor into the United States, as already stated. It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat.

From this it clearly appears that the defendant Williams was in no way connected with the alleged conspiracy, and that in the judgment of the court the facts were legally insufficient to support the verdict of guilty.

Counsel for appellants likewise cite several other Federal cases, all of which are referred to in the last case of *United States v. Sugarman* which is quoted above, and in all of these cases a distinction is made between insufficiency of the evidence and legal insufficiency of the evidence. We respectfully submit that in this case there was evidence submitted which justified the verdict of the jury, and that the same should not be disturbed.

VIII.

No Misconduct Was Committed by the United States Attorney in His Argument to the Jury.

Counsel, in urging the eighth assignment of error, predicates the same upon alleged misquotations of the testimony on the part of counsel for the Government. That such was not the fact is borne out by the statement of the presiding judge, that no attempt was made on the part of counsel for the Government to misquote the testimony, and took occasion to criticize counsel for appellants for their continued interruptions of the closing argument of counsel for the Government.

In the case of *Latham v. United States,* 226 Federal 420, it appeared that counsel for the Government made the statement to the jury that had the train not been three hours late, he would have had another witness who would have testified that he also had been defrauded. It is very clear that this was a statement not justified under the evidence introduced in court nor proper deductions to be drawn. Therefore, the court very properly held that such statement was a misstatement of the evidence, and could in no way be part of the closing argument of counsel. It is quite apparent that such a state-

ment on the part of counsel for Government in any case would be prejudicial to the rights of defendants on trial.

It would appear to us that were it a fact that counsel for Government had conducted himself as counsel for appellants would like to have it appear, that such conduct would have been subject to a prompt rebuke on the part of the court, but such was not the case in the case under consideration. On the contrary, the court stated in open court that the interruptions made were uncalled for, and that no statement was made by counsel not borne out by the evidence, and in this case there is no showing made that any of the testimony alleged to have been misquoted by counsel for the Government was of such character as could not have been remedied by proper instructions, if the facts warranted the same.

Counsel for Government regrets that it became necessary for him to make certain statements concerning one of the counsel for the defendants, but respectfully submits that any intemperance of speech on the part of the prosecuting attorney to constitute error must be shown to have prejudiced the defendants. Such a showing was not made, and we are of the opinion that the remarks addressed by counsel for the Government to counsel for the appellants were fully justified in view of the very apparent purpose for which the uncalled for interruptions were made.

Here again counsel takes exception to conduct of the learned judge in reprimanding counsel for appellants for their conduct during the time that counsel for Government was arguing the case. We respectfully submit that a reading of the evidence submitted to this court will show that counsel for appellants were so conducting themselves which fully justified the mild reprimand which they received.

IX.

The Court Did Not Misdirect the Jury.

Appellants contend that the court misdirected the jury and virtually instructed that, as a matter of law, appellants were guilty of the offenses charged, thereby invading the province of the jury. We concede that any instruction so invading the province of the jury, unlimited and unqualified, will constitute error. In the instant case, however, the court was very careful to advise the jury that they were the sole judges of the facts, and that they should not permit their province as sole judges of the facts to be invaded, and that they should disregard any impression as to the court's view of the merits of the case. This instruction was set forth on pages 240 and 241 of the transcript, as follows:

> "We may speak of the facts by way of illustration of a point of law which we feel necessitated to make. We may speak of the facts by way of illustrating what powers of consideration and what range of considerations should be entered into to weigh facts. Just as we have said, the government's testimony is, in the main, undisputed, but whatever we may do or have already done which may give to any one of you some sort of impression as to how this court considers the merits of this case, it is very necessary that you should not permit yourselves, as the sole judges of the facts, to be weighed by any such thought or influence of impression, but be jealous that you should be unaided by the court, except as the court advises you as to the law and incidentally discusses the facts and that your province is not invaded as the sole judges of the facts. You are the sole judges of the credibility

of witnesses. Now, credibility is an incident of a trial which is affected by testimony and evidence, and when we discuss your privileges as the sole judges of the credibility of witnesses, we may say something about facts that bear upon that subject and can, except as the court aids you by whatever we may say on those subjects, to fully consider this case in all its bearings and you should not permit yourselves to be influenced by what you consider the court's opinion as to the credibility of any witness, but exercise your function unaided by any such impression, as the sole judges of that credibility."

It should also be noticed in this case that the first instruction quoted by appellants under Point IX on pages 77 and 78, was not accepted.

Appellants also contend that the court misdirected the jury with respect to the pipe line from the Quirin mine. (Argument, page 81.) This instruction dealt only with appellant Quirin. The court was again careful to advise the jury in connection with this instruction. Any conclusion the court might have reached should not be the conclusion of the jury, as it was the jury's business and not the court's. [Tr. p. 255.]

The court, immediately thereafter, again advised the jury that they were the sole, exclusive judges of the facts in the following language:

"The Court: Now, gentlemen of the jury, again we remind you that you are the sole judges of the facts of the case and that you are to exercise this function unaided by any impressions you may have respecting the court's opinion as to the guilt or innocence of any of these defendants. You must not

permit yourselves to be aided in your cogitations, on this case, by what you think the court thinks about it. You are the sole judges of the credibility of these witnesses, and we remind you of what was said in the beginning about the office of reasonable doubt. In a conspiracy case, as in other criminal cases, the several accused here are presumed to be innocent until the contrary is shown by proof. Whether that proof is in whole or in part circumstantial, the circumstances relied upon by the prosecution must so indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the accused's innocence."

We respectfully contend that the court's instructions, taken as a whole, correctly set forth the law, and no error was committed by the court in giving the instructions complained of.

For the foregoing reasons, it is respectfully submitted that the judgment appealed from be affirmed.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney.

J. GEO. OHANNESIAN,
and
WILLIAM R. GALLAGHER,
Assistant United States Attorneys.